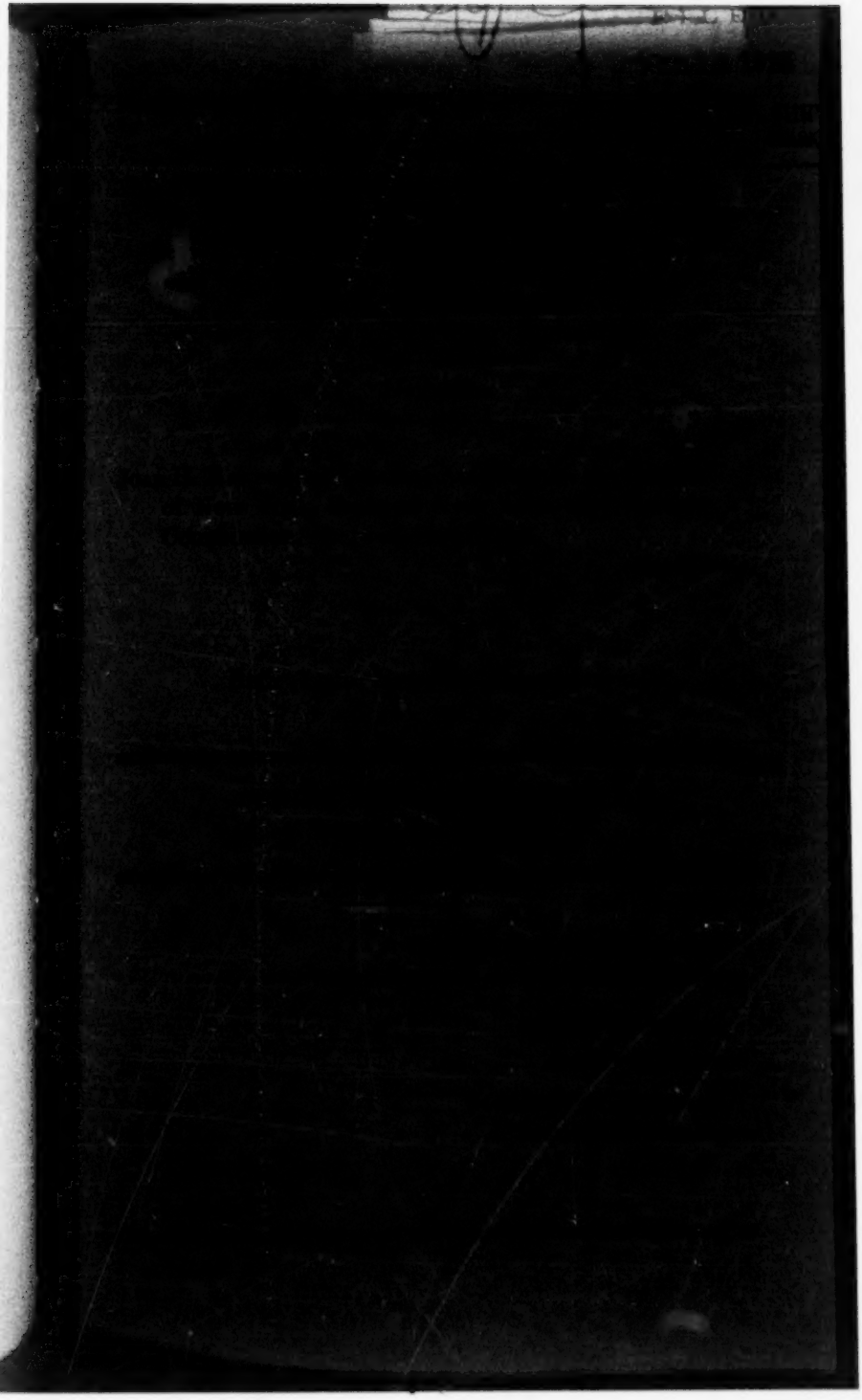

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 465.

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and Transit Commission, State of New York,

Appellants,

vs.

BELT LINE RAILWAY CORPORATION.

BRIEF FOR APPELLANT TRANSIT COMMISSION.

Statement of the Case.

The Proceedings.

This is an appeal by the Transit Commission of the State of New York (successor to the Public Service Commission, First District), and the District Attorney of New York County, from a final decree of the District Court of the United States for the Southern District of New York,

made on November 30th, 1923 (R., pp. 120-122). This decree enjoined the enforcement as against the Belt Line Railway Corporation of an order made by the Public Service Commission, First District, on October 29th, 1912, establishing certain through routes, requiring the exchange of transfers for this purpose, and fixing the fare to be charged at five cents (R., pp. 15-26).

The suit was brought by the Belt Line Railway Corporation in December, 1920, against the Public Service Commission, the District Attorney of New York County, and the Attorney General of the State. As the Public Service Commission (now the Transit Commission) represents and exercises the power of the State in the matters involved, the Attorney General never appeared or answered and may be regarded as out of the case.

An injunction *pendente lite* was granted by the "Statutory Court" of three judges, organized under §266 of the Judicial Code, on January 26, 1921 (R., pp. 67-71). While the three months period in which an appeal might have been taken to this Court (Act of Sept. 6, 1916, §6) was running, the Public Service Commission, First District, was superseded by the Transit Commission, which was created by Chapter 134 of the Laws of New York of 1921. This Statute became a law on March 30, 1921 (R., p. 72). The appointment of the Commissioners took effect on April 25th, 1921 (see Transit Commission Reports, N. Y., Vol. I, fly leaf). This change of organization and administration took place just as the time to appeal from the injunction order was expiring.

On June 28, 1922, a motion on the pleadings to dismiss the Bill was denied and the cause was referred to Hon. E. Henry Lacombe, as Special Master, to hear the allegations and proofs of the parties and report the evidence with his findings and conclusions (R., pp. 75, 77). The Report of the Special Master was filed on May 25th, 1923 (R., pp. 79-110). Exceptions to such Report were filed by the present appellants (R., pp. 110, 114) and, after argument thereon, the basic conclusion of the Master, that the order attacked was confiscatory, was confirmed and the final decree now appealed from was made on November 30th, 1923 (R., pp. 118, 120). As will be pointed out hereafter, the Master differed in his conclusions upon both the law and the facts from the Statutory Court, and Judge Knox on final hearing differed from the Master on many important facts, but apparently deemed himself bound to follow the decision of the Statutory Court on certain points as "the law of the case" (R., p. 119).

The Facts.

There is little or no conflict of testimony in this case. The controversy upon the facts arises from the different inferences and conclusions to be drawn from testimony and statistics which are substantially undisputed. It is necessary to state the facts in some detail and further reference to the evidence will also be made in the Argument.

The Belt Line Railway Corporation is the successor to the Central Park, North and East River Railroad Company, which in 1912 operated a street railroad in New York City, across town on 59th Street at the southern end of Central Park

from First to Tenth Avenues, known as the 59th Street Crosstown Line, and up and down town on the East and West sides of Manhattan Island from 59th Street to the Battery, where the East and West Belt Lines, as they were styled, met, making a total mileage of a little over twenty miles.

Owing to the long and narrow configuration of Manhattan Island, with its long main avenues running North and South, and its short cross streets at right angles East and West, and with Central Park separating the East and West sides from 59th to 110th Street, the 59th Street Crosstown Line constituted a central link in the principal through routes between the upper East and lower West side or the upper West and lower East side.

On October 29th, 1912 (R., pp. 14-26), the Public Service Commission, acting under subd. 3 of §49 of the Public Service Commissions Law, made a transfer order establishing a number of through routes and requiring transfers therefor at a single five cent fare. This order required the Central Park, North and East River Railroad Company to exchange transfers at the intersections of its 59th Street Line with the lines operated on First Avenue, Second Avenue, Third Avenue, Lexington Avenue, Madison Avenue, Sixth Avenue, Seventh Avenue, Broadway, Eighth Avenue, Ninth Avenue and Tenth Avenue (R., pp. 15-25). The Central Park, North and East River Railroad Company expressly accepted this order (R., p. 391) and agreed with the other Railroad Companies affected upon a division of the five cent fare, giving two cents to the cross-

town line and three to the up and down-town lines (R., p. 306).

Afterwards, and on November 14, 1912, the property and franchises of the Central Park, North and East River Railroad Company were sold under foreclosure to one Cornell (R., pp. 270-278, 265), who organized the Belt Line Railway Corporation (R., pp. 286-288), the present appellee, hereinafter usually designated the plaintiff, and conveyed to it the property and franchises formerly owned by the predecessor company (R., p. 279).

In 1919 and 1920 the Receiver of the New York Railway Company turned back the leased lines on Eighth, Ninth and Madison Avenues to their owners, who were not parties to the transfer order and were therefore not bound by it. This eliminated a number of the through routes previously afforded. On June 3rd, 1919, with the approval of the Public Service Commission, the East Belt Line, with about ten miles of track, was abandoned (R., pp. 174, 182); and on March 24, 1921, the West Belt Line, with 8.831 miles of track, was in like manner abandoned (R., pp. 174, 182). This left the Belt Line Railway Corporation operating only the 59th Street line from First to Tenth Avenue, and south on Tenth Avenue to 54th Street, a total distance of about two miles (R., pp. 137, 179, 180), and exchanging transfers with the lines of the Third Avenue Railway Company, the Second Avenue Railroad Company and the New York Railways Company.

On May 11, 1920, the Receiver of the New York Railways Company applied to the Public Service Commission, First District, to be relieved of the

requirements of the transfer order (R., pp. 393-399). The Belt Line Railway Corporation later joined in the application and asked for a discontinuance of all transfers except with the lines of the Third Avenue System, of which it was and is a part (R., pp. 348-351). After hearings, the Commission, on July 9, 1920, made an order requiring the continuance of the transfers, but increasing the joint rate from five cents to seven (R., pp. 48, 49). The Belt Line Railway Corporation did not accept this order and on July 23, 1920, applied for a rehearing. The Receiver of the New York Railways Company made a similar application on August 28, 1920 (R., pp. 402, 403). On August 31st, 1920, the Commission ordered a rehearing and suspended the operation of the order of July 9, 1920, pending its determination (R., p. 405). Counsel for the present appellee frankly stated in his brief on the motion for preliminary injunction that he would have challenged the seven cent transfer order, had it remained in force, on the same grounds as the five cent transfer order. In other words, he objects, and has consistently and persistently objected, to any joint rate whatever, and therefore to any effective transfer order.

The taking of testimony on the rehearing was concluded on November 10, 1920 (R., p. 138), but the case was not then finally submitted, for thereafter counsel for the Receiver of the New York Railways Company represented to the Commission that the Stenographer's Minutes of the rehearing were erroneous on a material point, namely, the time of day ("rush hours" or non "rush hours") when the majority of the transfer

passengers were carried, and on December 16, 1920, submitted what appeared to be his final proposed corrections (R., pp. 426, 428, 429). On the same day, and while one of the petitioners was thus holding the rehearing open, the other (the present appellee) hurried into court with a Bill of Complaint verified two days before, alleging that the Commission had refused or failed to decide the rehearing within thirty days after its final submission, pursuant to §22, Public Service Commissions Law (R., pp. 11, 85). Shortly thereafter the preliminary injunction was granted and had the effect of abolishing all transfers between the line of the plaintiff and the lines of the New York Railways Company and of the Second Avenue Railway Company. There has thus been a substantial period of operation without the transfers objected to, so that the Court below had on final hearing, and this Court now has, an opportunity to compare actual results instead of merely conjecturing the probable result of giving the plaintiff the relief it sought.

The preliminary injunction was granted upon *ex parte* affidavits, which the Court regarded as sufficient to show for the purposes of the motion that the Belt Line Railway Corporation, upon its whole operations, was not earning a sufficient amount to pay actual operating expenses, and was carrying a majority of its passengers upon transfers for two cents each, which the Court regarded as less than the actual cost of their carriage. Many of the so-called "findings" made by the Statutory Court were shown by the evidence before the Master to be erroneous.

The theory upon which the Statutory Court proceeded, and which the plaintiff has continued

to urge, is that the cost of carrying the transfer passengers should be determined by dividing the total expenses of operation, plus interest paid on indebtedness, by the total number of all passengers carried, and that, if the rate received for carrying any passenger is less than the cost as so determined, such rate is confiscatory.

The Master rejected this contention, and held that the proper test was that urged by the Commission, namely, whether the additional cost of carrying transfer passengers so exceeds the revenue derived therefrom as to constitute confiscation. As the Master put it, after premising that aside from the required transfers the results of the Company's operations must on the Record be regarded as satisfactory to it (Rec., p. 97):

> "The actual question presented is whether the rendition of the additional service now required by the revised order of October, 1912, temporarily suspended by the injunction, will so substantially reduce the income, or increase the outgo as to change the present satisfactory condition to an unsatisfactory one."

He also said (R., p. 97):

> "The sole question is: will this additional service (additional to the double service it already renders,—to its own passengers and to the Third Ave. transfers) cost so much more to perform than the revenue obtained from it will produce, as to be confiscatory?"

In applying this test, however, the Master reached erroneous conclusions as to the facts, some of the most important of which were recog-

nized and pointed out by Judge Knox in the District Court (R., p. 118).

The Master compared the results of operation for a one year period after transfers were discontinued by the injunction with those for a corresponding period prior to the injunction (R., pp. 92-104) and found that since the injunction the number of passengers had been reduced by about 2,000,000 (R., pp. 95, 102) passenger revenue by over $46,000 and operating expenses by $105,900 (R., p. 104). He attributed all this decrease in operating expenses to the discontinuance of the transfers (R., pp. 102-104). In this he was clearly in error, as indicated by Judge Knox (R., p. 118). He considered that if transfers were restored, the lost passengers would return (R., p. 96) the revenue would increase by over $46,000, and the expense by $105,900 (R., p. 104). Adding these estimated increases to the actual figures for the year ended June 30, 1922, he found that if transfers were restored the result would be as follows:

	Actual figures with transfers abolished	Estimated Increase	Estimated figures—transfers restored
Revenue	$580,526.97	$46,326.72	$626,853.69
Expenses	415,327.07	105,900.00	521,227.07
Net	$165,199.90 (R. p. 108)		$105,626.62 (R. p. 109)

Taking certain estimates of the cost to reproduce the property at 1921 prices, less "the cost to place the property in first class operating condition" (R., pp. 157, 158), which he erroneously called "depreciation" (R., pp. 106, 109), he found the value of the property to be $2,600,000 (R., p. 109). The actual net income of $165,199.90

would give a return of over 6% on this valuation (R., p. 108), but the estimated net income of $105,626.62 would give a return of 6% only upon the smaller sum of $1,760,443 (R., p. 109). He, therefore, concluded that so much of the order of October 29, 1912, as requires plaintiff to exchange transfers for a single five cent fare with the lines of the Second Avenue Railroad and of the New York Railways, is confiscatory (R., p. 109).

The learned District Judge did not agree with the Master's conclusion that the reduction of $105,900 in the cost of operation was due to the injunction. He found that it was due to reduced wages, lowered prices for materials, and the abandonment of the West Belt Line (R., p. 118). Without ruling specifically upon the exceptions to the Master's report, he confirmed the Master's conclusion that the joint rate, if enforced, would continue to be confiscatory (R., p. 120). It is clear that this decision was based upon erroneous inferences and conjectures, and upon a misapplication of the supposed ruling of the Statutory Court.

Although the District Judge found that the discontinuance of the transfers had resulted in no substantial decrease in car mileage (R., p. 118), he assumed that upon a restoration of the same transfers there would be a 12½% increase in passengers and inferred that this would necessitate a ten per cent increase in car mileage, and that the total operating expenses would increase in exact proportion to the car mileage. From these assumptions and inferences he found that the increase in expense would be about $46,000 and that the probable additional revenue would not

exceed $42,000 (R., p. 119). "Upon this theory," he said, "the five cent joint rate, if restored, would be confiscatory" (R., p. 119). This is directly contrary to the Master's legal theory which the Court apparently approved. Taking the Master's basic figures, the addition of these increases to the revenue and expenses would show a net income of approximately $161,200, which is substantially over 6% upon the valuation of $2,600,000 which the Master found and the Court approved.

The learned District Judge evidently realized that this conclusion of his rested on very weak foundations, for he then continued:

> "But even though I be mistaken upon this feature of the case, there remains another obstacle to the contentions put forth by defendants. It is this: If the passengers * * * as to whom plaintiff would receive only two cents each * * * are to be considered as being only properly chargeable with such proportion of plaintiff's costs in carrying them and as is attributable to other passengers travelling over the line, there can be no doubt as to the propriety of granting the relief asked by plaintiffs."

Upon this point, he considered that the Statutory Court had given "approval to the theory," and said:

> "Such holding should, I think, be considered as the law of the case" (R., p. 119).

He continued:

> "Adopting as I do the ruling of the statutory court, and accepting the Master's calculation upon the number of passengers to

> be carried, the cost of transporting each of them, whether by transfer or not, would be upwards of three cents. This cost, when added to fixed charges for borrowed money, would leave plaintiff without revenues sufficient to cover depreciation and a fair return on capital" (R., pp. 119, 120).

It will be shown in the Argument that the Statutory Court was mistaken as to both the law and the facts, and that the theories which it applied on the decision of the motion for injunction were not binding on the Court on final hearing.

The learned District Judge then added that "aside from the particular theory to be employed in determining whether the * * * order of October 29, 1912, is confiscatory," the granting of an increase by the Commission in June [error for July] 1920, was equivalent to a declaration that the order complained of was still confiscatory at the time of the final hearing, which was in or about October, 1923 (R., p. 120).

On the hearing before the Master, the plaintiff below introduced tabulations showing a comparison of the revenues and expenses prior to the injunction (January 31, 1921) with those subsequent thereto (R., pp. 148, 149, 174). These figures were not confined to the 59th Street line but included the figures for all lines operated by plaintiff (R., pp. 326, 328). This comparison is not appropriate, because the figures for the pre-injunction period included revenues and expenses from the West Belt Line, which was abandoned March 24, 1921 (R., p. 174), and also because wages and prices were higher in the earlier period (R., pp. 172, 178).

The Commission introduced tabulations comparing the results of operation on the 59th Street line for the different periods (R., pp. 430-433) and showing a loss of passenger revenue on that line since the injunction (R., pp. 408, 409). As there has been practically no reduction in the number of cars or car miles on that line since the injunction (R., p. 144) it is manifest that the loss in revenue was not offset by any compensating saving in operating expenses, and that the effect of the injunction was actually detrimental to the plaintiff. These tabulations will be further discussed in the Argument.

The plaintiff objected to, and the court enjoined, the requirement of transfers only in so far as they were exchanged with lines other than those of the Third Avenue system, of which plaintiff is a part (R., pp. 70-71). Since the injunction, the passengers and passenger revenues have increased on the Third Avenue line (R., pp. 410, 411) while a decline is shown on the parallel lines of the Second Avenue (R., pp. 412, 413) and of the New York Railways (Exh. CV., R., fol. 643), which are only one block distant. The other lines of the Third Avenue system also show increases in passenger revenue (R., pp. 414, 415, 416, 417). The result and undoubtedly the purpose of this injunction suit therefore was not to benefit the plaintiff as a separate corporate entity, but to divert traffic from competing lines to those of the Third Avenue Railway Company, which owns the capital stock of the plaintiff (R., pp. 406, 407).

Although contending in its Bill that each transfer passenger means a loss (R., p. 8), plaintiff gladly retains transfers with the lines of the

Third Avenue Railway System, of which it is a part. It recognized the fact, and informed the Court, that to enjoin transfers with other lines would divert much of the transfer traffic to lines of that System (R., p. 61).

The Third Avenue System embraces some ten or twelve street railway companies operating in the City of New York (R., p. 220) including the Third Avenue Railway Company, the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company, and the plaintiff. It operates 375 miles of surface street track (R., p. 138); the plaintiff only about four (R., pp. 179-180). The identity of interest and management is close. Company officials who testified for plaintiff occupied identical positions in each of the constituent companies (R., pp. 136, 138, 220). Cars bear the legend "Third Avenue Railway System" (R., p. 210) and not the names of any constituent company (R., p. 210). Tax reports are made for the "System" (R., p. 155). The Third Avenue Railway Company, the parent company, owns all the capital stock of the plaintiff and can therefore control its policy (R., pp. 406, 407).

The narrative form of the Master's Report, without separate and distinct findings of fact and conclusions of law, and the fact that the District Court did not pass specifically upon the exceptions to the Report, but merely confirmed the Master's ultimate conclusion that the five cent joint rate was confiscatory, made it necessary to frame the assignments of error presented with the petition of appeal in a more elaborate and detailed form than would otherwise have been

required. For the purpose of this Brief they will be stated in a more condensed and general form.

Specification of Errors.

It is submitted that the Court below erred:

1. In holding the order of the Commission of October 29, 1912, requiring transfers and fixing a joint rate of five cents therefor, to be confiscatory, and in confirming the conclusion of the Master to this effect, and in enjoining the enforcement of the order (Assts. of Error 1, 2, 4, 5, 6, 7; R., pp. 123, 124).

2. In holding that the restoration of the transfers would not produce sufficient additional revenue to reimburse plaintiff for the additional expense which would be imposed thereby (Assts. of Error 8, 9; R., p. 124).

3. In following the cost-per-passenger theory of the Statutory Court (Assts. of Error 10, 11, 13; R., p. 124).

4. In fixing the valuation of plaintiff's property at $2,600,000 (Asst. of Error 12; R., p. 124).

5. In holding that the Commission's order of July 9, ("June" in Asst. of Error is misprint) 1920, granting an increase in the joint rate, was equivalent to a declaration by the Commission that the five cent joint rate is confiscatory (Asst. of Error 14; R., p. 124).

6. In refusing to hold that the plaintiff had voluntarily assumed the obligation to perform

the service required by the order of October 29, 1912, and, having been incorporated and acquired its properties subsequent to such order, cannot complain of it as unconstitutional (Assts. of Error, 15, 22, 23; R., p. 125).

7. In refusing to hold that the Commission did not fail to decide the rehearing within thirty days after final submission (Asst. of Error, 16; R., p. 125).

8. In refusing to hold that the order complained of is a reasonable service requirement (Asst. of Error 18; R., p. 125).

9. In refusing to hold that the conduct of plaintiff disentitles it to equitable relief (Assts. of Error 17, 19; R., p. 125).

10. In holding that plaintiff had no remedy at law and in refusing to hold that the rate making process had not been completed (Assts. of Error 3, 24; R., pp. 123, 126).

11. In refusing to dismiss the Bill upon the pleadings (Assts. of Error 20, 21; R., p. 125).

12. In failing to separate the earnings, expenses and valuation of the 59th Street line from those of the other properties of the plaintiff (Assts. of Error 25, 26, 27; R., p. 126).

BRIEF OF THE ARGUMENT.

1. This Court has jurisdiction of this direct appeal from the District Court.

2. The transfer order was not confiscatory because:

(A) It was a reasonable service requirement.

(B) The additional expense which would be imposed by a resumption of transfers would not exceed the additional revenue which would be derived from the transfer passengers attracted thereby.

3. The cost-per-passenger theory applied upon the disposition of the motion for preliminary injunction and by the District Court on final hearing is erroneous.

4. The rate making process was not complete and plaintiff had not exhausted its legal remedies in the State Tribunals.

5. The plaintiff's own conduct in the matter has been such as to disentitle it to equitable relief.

6. The plaintiff voluntarily assumed the obligation to carry transfer passengers, pursuant to the order of October 29, 1912, for two cents each, and, having been incorporated and acquired its properties subsequent and subject to such order, is not entitled to complain of it as an infringement of any constitutional right.

7. The valuation placed upon plaintiff's property by the Court below was erroneous in law and fact and unsupported by competent evidence.

POINT I.

This Court has jurisdiction of this direct appeal from the District Court.

The jurisdiction of the District Court was invoked and exercised and necessarily depended upon allegations that the order complained of violated rights claimed by the plaintiff under the Federal Constitution.

The Public Service Commissions Law of New York (Chap. 48 of the Consolidated Laws) by §56 prescribes as follows:

> "1. Every * * * street railroad corporation * * * shall obey, observe and comply with every order made by the commission, under authority of this chapter, so long as the same shall be and remain in force. Any * * * street railroad corporation which shall violate any provision of this chapter, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the state of New York not to exceed the sum of five thousand dollars for each and every offense."

By subd. 2 of the same Section any violation of or failure to obey any such order by an officer or agent of such a corporation is made a misdemeanor.

By §§26, 28, 29 and 49 of the same Act, the Commission has power to control and regulate "through routes and joint rates." §49 was amended by Chap. 134 of the New York Laws of 1921, but the amendments merely extend and broaden the powers of the Commission. As the plaintiff has not at any time questioned the power

of the Commission to require transfers and fix joint rates, provided that the rates are not confiscatory, it is not deemed necessary to quote the statutes at length.

The order of the Commission thus has the force and effect of a State law or statute.

> See *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226.
> *Knoxville* v. *Water Co.*, 212 U. S. 1, 8.
> *Milwaukee Elec. Ry.* v. *Wisconsin R. R. Comm.*, 238 U. S. 174, 180.

This is therefore "a case in which the * * * law of a State is claimed to be in contravention of the Constitution of the United States" under §238 of the Judicial Code (Fed. Stat. Ann., 2nd Ed., Vol. 5, p. 794) and direct appeal to this Court is accordingly proper.

The practice of direct appeal to this Court in cases of this nature is so thoroughly established that citation of decisions on the subject would be superfluous.

POINT II.

The transfer order was not confiscatory because:

(A) It was a reasonable service requirement.

(B) The additional expense which would be involved by a resumption of transfers would not exceed the additional revenue which would be derived from the transfer passengers attracted thereby.

(A) This case does not put in question the entire rate structure of the plaintiff, nor does it necessarily involve the profitable or unprofitable results of its operations as a whole.

The order complained of and enjoined is primarily a service order, requiring the performance by the plaintiff of a specific incidental service for the convenience of the public of such a nature that the practice had been generally adopted by railroads for business reasons before it was required by law (see *Mich. Cent. R. R.* v. *Mich. R. R. Comm.*, 236 U. S., 615, 631).

Owing to the almost complete lack of diagonal streets on Manhattan Island—Broadway being the only one of importance—one of the great functions of the comparatively short cross town lines is to serve as links in the chain of transportation for passengers who wish to go up or down town and also east or west. There being no hypothenuse available the passenger must perforce travel along both the base and the perpendicular. This is for him but one journey, and he has for years counted on making it for one fare. The order complained of merely requires the performance of this reasonable service. Such an order will not be adjudged unreasonable, confiscatory and invalid, merely because it involves or may involve some slight loss.

This Court so held in *Chesapeake & Ohio Ry.* v. *Public Service Commission*, 242 U. S. 603.

Here the Public Service Commission of West Virginia had required the Chesapeake & Ohio Railway Company to install and maintain a passenger service of two trains a day on a branch line previously used for freight only, but declared by its charter to be "'free to all persons for the transportation of their persons and property,' subject to the payment of the lawful charges for such transportation."

This Court pointed out that the required passenger service "would not presently be remun-

erative, but would entail a pecuniary loss" and said:

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 26; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 279; *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 529; *Chicago, Burlington & Quincy R. R. Co.* v. *Wisconsin Railroad Commission*, 237 U. S. 220, 229. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered. Cases *supra*. Applying these criteria to the order in question, we think it is not shown to be unreasonable."

See also

> *Railroad Commission* v. *Eastern Texas R. Co.*, 68 U. S. (Lawyers' Ed.) 309, 311, as follows:

> "So long as the railroad company 'continues to exercise' the privileges conferred by its charter, the State has power to regu-

late its operations in the interest of the public, and to that end may require it to provide reasonably safe and adequate facilities for serving the public, even though compliance be attended by some pecuniary disadvantage."

Also *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 433, 434, 440.

So in the case at bar, it would not be unreasonable to require the plaintiff to issue and receive transfers for a single fare, even if the share of such fares apportioned to plaintiff did not fully meet the additional expense imposed upon plaintiff by the requirement.

This principle is of itself a sufficient reason for dismissing the Bill. It will be shown in the next subdivision of this Point, however, that not only did the plaintiff fail to prove that the additional expense imposed by the transfers exceeded the revenue therefrom, but that, on the contrary, the evidence establishes precisely the reverse.

(B) The Master found in substance that the resumption of transfers would increase the total expenses of operation in round numbers $105,900 and that this increase would be in round numbers $59,500 more than the increase in revenue derived from the transfer passengers (R., p. 104). The District Court found that the increase in operating expenses would be about $46,000 and the increase in revenue about $42,000 (R., p. 119), a "slight loss," which, under the doctrine of the *Chesapeake and Ohio* case, *supra*, certainly would not render an otherwise reasonable service order invalid.

The Master's conclusions on this point were at variance with the undisputed evidence and this was recognized by the District Court (R., p. 118). The District Court's conclusion was based upon a wholly unwarranted conjecture or inference as to a probable increase of 10% in car mileage. As these points involve statistics and tabulations, they will necessarily have to be discussed in some detail.

In view of the lack of agreement between the Master and the District Court, this Court is especially called upon to exercise that "complete freedom in dealing with the facts" which it reserves to itself in cases of this character.

> See *Knoxville* v. *Water Co.*, 212 U. S. 1, 8.

The Master took as the basis of his conclusion the statements of revenues and operating expenses for the years ended respectively June 30th, 1921 (Exhibit BE, R., p. 330) and June 30th, 1922 (Exhibit BF, R., p. 332). The earlier period was principally a transfer period and the latter was wholly a non-transfer period. On his comparison of the revenues he found that there was a decrease in passenger revenue after the required transfers had been done away with by the injunction, amounting in round figures to $46,000. He therefore found that a resumption of transfers would increase the passenger revenue in this amount (R., p. 104). This conclusion was based upon the actual decrease in the number of transfer passengers after the injunction, and is not questioned upon this appeal.

The Master then proceeded to a comparison of the various items making up the expenses of operation in the two periods mentioned. He found an actual decrease in the period after the

injunction in each of the following items in the following approximate amounts (R., p. 104):

Maintenance of equipment	$17,000
Power Supply	20,000
Operation of Cars	53,000
Injuries to persons and property	13,600
Total	$103,600

He concluded that a resumption of transfers would involve a corresponding increase. He also found that there would be an increase in taxes in the sum of $2,300, making a total increase in expenses of operation in the aggregate sum of $105,900 which he held would be caused by a resumption of the required transfers (R., p. 104).

It was here that the Master apparently was misled by that ancient logical fallacy, *post hoc ergo propter hoc*. He assumed not only without evidence to support such conclusion, but in disregard of evidence directly proving the contrary, that because certain decreases in expenses of operation were subsequent to the abolition of the transfers complained of, they were the result of such abolition. He also disregarded the well established rule that in such a case as this the order of the Commission must be assumed to be reasonable and proper and that the burden of proof is upon the person attacking it to show, not only that it is unreasonable, but that it is confiscatory.

See

San Diego Land Company v. *National City*, 174 U. S. 739, 754.

Minneapolis & St. Louis Rd. Co. v. *Minnesota*, 186 U. S. 257, 264.

Des Moines Gas Co. v. *Des Moines,* 238 U. S. 153, 163.
Darnell v. *Edwards,* 244 U. S. 564, 569.

In this case it was for the plaintiff to show that the decreases in expenses of operation were caused by the abolition of transfers, and that they were not due to other causes. Plaintiff failed to do so and the evidence demonstrates the contrary. Where other contributory causes of decrease were affirmatively shown by the Commission, it was incumbent upon the plaintiff, in full possession of the facts and figures, to adduce evidence upon which to apportion the total decrease among the different causes. The different items will be taken up separately.

1. Maintenance of Equipment, $17,000.

Upon this Point the Master said (R., p. 102):

> "There is no proof of any other cause op-
> "erating to produce this decrease."

He entirely disregarded a most important contributing cause shown by the evidence, namely, the abandonment on March 24th, 1921, of over eight miles of track of the West Belt Line (Exhibit I; R., p. 297) and the consequent retirement of the equipment used for the operation of that line. He also brushed aside the 10% decrease in the cost of wages and materials testified to by plaintiff's own witness Farrington on cross-examination (R., pp. 172, 173, 178), upon the mere assumption that this decrease was not subsequent to June 30th, 1921. It is true that when Farrington gave this evidence he was being ques-

tioned concerning a comparison between the period February 1st, 1919-September 30th, 1920, and the period February 1st, 1921-September 30th, 1922. The precise date of the decrease was not stated. The fact of the decrease, as affecting a period after the abolition of transfers, having been proved, it was for the plaintiff to show its exact date if plaintiff deemed it material. It is believed that the decrease actually took effect in August, 1921. The District Court reached the proper conclusion upon this point, namely, that

> "the lessened outlay for operating expenses for the year ending June 30, 1922, when compared with like expenditures for the preceding year, is primarily to be attributed to reduced wages, lowered prices for materials and the abandonment of a portion of plaintiff's line of transportation" (R., p. 118).

2. Power Supply, $20,000.

Here the Master indulged in extraordinary conjectures, based upon nothing whatever in the Record, concerning the increase of power which he assumed would be required to move cars containing an additional load of transfer passengers. He wholly overlooked the fact that prior to March 24th, 1921, the Company was operating 8.831 more miles of track than it was in the year ended June 30th, 1922, after the abandonment of the West Belt Line. While it is true that the West Belt Line was operated with storage battery cars, nevertheless the power necessary to charge their storage batteries must have been supplied and paid for by the plaintiff and there is nothing in the Record to indicate that it requires any less

power to propel a car by storage battery than by underground current. In fact, it is believed that the reverse is the case.

Upon this point the Master also said (R., p. 102):

> "Obviously it would require a substantial "increase of car mileage to carry them [the "additional 2,000,000 passengers] and that "would require a substantial increase of "power."

This is contrary to the testimony of plaintiff's witness Thompson that, after the discontinuance of the transfers, plaintiff continued to operate the same number of cars on the 59th Street Line and that the mileage operated was substantially the same (R., p. 144).

The operation of the West Belt Line must have been unprofitable, or it would not have been abandoned. It was manifestly this legal amputation of a withered limb that brought financial relief to the plaintiff. The Master's disregard of this essential element vitiates all his conclusions. It was for the plaintiff to show how much of the decrease in the expense of operation was due to the abandonment of the West Belt Line. It did not do so, although such evidence was peculiarly within its knowledge. The necessary inference is that the evidence would have been unfavorable to its contentions in this suit.

3. Operation of Cars, $53,000.

Here again the Master overlooked the decrease in wages which made up the great bulk of this item and the still more important factor of the

abandonment of the West Belt Line. The Master said:

> "The shrinkage was undoubtedly the re-
> "sult of decreased car mileage" (R., p. 103).

He apparently attributed this decreased car mileage entirely to the discontinuance of the transfers, whereas as shown under the preceding item there was no substantial decrease of car mileage on 59th Street, and the difference in this item must therefore have been due to the abandonment of the West Belt Line, with its nearly nine miles of track.

4. Injuries to Person and Property, $13,600.

Here no causal connection between the smaller number of passengers after the discontinuance of transfers and the smaller amount of damage claims paid is shown. No account whatever is taken of the decreased field of operation due to the abandonment of the West Belt Line. Moreover, as a matter of common knowledge and experience, it is hardly to be supposed that the bulk of the payments made in the year ended June 30th, 1922, were for accidents which occurred during that year. Such expedition in either litigation or voluntary settlement is quite unprecedented.

5. Taxes, $2,300.

Here the comparison between the two periods discussed by the Master shows an actual increase in taxes in the post-injunction period. The Master found, however, that a resumption of transfers would increase the gross receipts approxi-

mately $46,000 and would therefore increase the total taxes by the 5% tax upon such increase in the gross receipts, being the sum of $2,300. Here the Master disregarded the provisions of §48 of the New York Tax Law under which all payments on account of the "gross receipts tax" are deducted from the amount of the franchise tax and therefore do not affect the total net amount of taxes paid by the Company unless the gross receipts tax happens to be larger than the special franchise tax. There is no proof or suggestion that it would be so in this case.

It thus appears that the Master was in error as to each of the items of expense of operation which he concluded or assumed would be increased by a resumption of the transfers. The actual decreases after the discontinuance of the transfers were shown to have been due largely, if not wholly, to other specific causes. Plaintiff's own witness Farrington admitted on cross-examination that he could not attribute any definite or even approximate portion of any of these decreases to the discontinuance of transfers (see R., p. 173). Upon this point the Master delivered himself of a most extraordinary utterance, saying:

> "The testimony is unimportant; perhaps "if the witness had been set to study the "figures as the Master has he might have "given a different answer" (R., p. 104).

The witness had testified that he had made a study of this very point (R., pp. 171, 172). It does not appear why the Master should have thus sought to draw inferences from the evidence more favorable to plaintiff's contentions than plain-

courage Commissions from ever granting rates substantially above the confiscatory point.

This Court has recently expressly held that the fixing by a Commission of higher rates does not establish that the former lower rates were confiscatory.

See

Prendergast v. *N. Y. Tel. Co.*, 262 U. S. 43, 46, 47.

The correctness of the position of the Commission is further emphasized by a comparison between the period from February 1st, 1921, to September 30th, 1922 (Exhibit BC; R., p. 326), which was wholly after the injunction, and the period from February 1st, 1919, to September 30th, 1920 (Exhibit BD, R., p. 328), which was wholly before the injunction. These two periods, of twenty months each, reflect the situation more comprehensively than the shorter periods discussed in the Master's report. A condensed comparative statement of the two Exhibits mentioned is as follows:

Revenues:	1921-1922	1919-1920
Total passengers	$866,434.35	$927,134.11
Advertising	15,440.04	14,635.03
Rent of buildings, etc.	73,970.78	36,641.27
Rent of tracks, etc.	1,250.00	2,125.00
Rent of equipment	———	1,100.00
Total revenue	$957,095.17	$981,635.41
Operating expenses and taxes	$750,842.84	$856,831.97
Interest on bonds	145,833.34	145,833.34
Interest on notes	6,974.70	6,244.79
Amortization, bond discounts	4,861.00	4,861.00
Total operating expenses and fixed charges	$908,511.88	$1,013,771.10
Balance	$48,583.29	D $32,135.69

It clearly appears that the favorable balance in the 1921-1922 period was not due to an increase in revenue. In that period the total revenue was $24,540.24 less, and the passenger revenue $60,-699.76 less, than in the 1919-1920 period. The favorable balance was due entirely to the decrease in operating expenses, which were $105,-989.13 less in the 1921-1922 period than in the 1919-1920 period. This was about the same in amount as the decrease found by the Master in his comparison of the two shorter periods discussed in his Report.

The items making up operating expenses and taxes in these two periods now under consideration as shown by Exhibits BC and BD (*supra*) are as follows:

	1921-1922	1919-1920
Maintenance of way, etc.	$103,729.90	$132,626.78
Maintenance of equipment	67,057.77	85,005.36
Power supply	64,217.51	81,428.08
Operation of cars	297,705.14	330,181.24
Injuries to persons and property	49,131.84	63,586.10
General miscellaneous expenses	40,664.35	41,430.49
Taxes	80,352.33	71,658.92
Hire of equipment	47,984.00	50,915.00
Total	$750,842.84	$856,831.97

This comparison is particularly interesting in that the decrease in the cost of operation of cars is almost exactly 10%, obviously resulting from the decrease of this percentage in wages of motormen and conductors which took place between the two periods (R., pp. 172, 173).

It is thus shown that the resumption of transfers at the five cent rate would substantially in-

crease the passenger revenue and would not increase the expenses of operation by any substantial amount, if at all.

The conclusion of the District Court was that the expenses of operation would be increased by a resumption of the transfers in just the amount (46,000, R., p. 119) found by the Master as the probable increase in passenger revenue, but upon some theory not made clear the District Court estimated the increase in revenue at only $42,000 (R., p. 119), $4,000 less than the Master's figures. The District Court's conclusion as to the increase in expenses was based upon a mere conjecture that an increase of 12½% in the daily number of passengers would require an increase of 10% in the mileage, although plaintiff's own witnesses established the fact that the elimination of the transfers had not brought about any substantial decrease in car mileage. If taking away the transfers did not decrease the car mileage, there is no basis for any inference that their restoration would increase it.

Even upon the District Court's figures, there was no confiscation and therefore no basis for the exercise of federal jurisdiction to grant relief. It is not necessary that the transfer traffic should show a profit. (See *Chesapeake & Ohio Ry.* v. *Public Service Commission*, 242 U. S. 603, 607). Upon the figures adopted by the Master, an annual aggregate of about 2,000,000 out of a total of about 16,000,000 passengers has been affected by the discontinuance of the required transfers (R., pp. 93, 102), that is, about 12½%. If this portion of the traffic is made even sub-

stantially self-supporting, the rate therefor cannot be confiscatory.

See

Minneapolis & St. Louis Rd. Co. v. *Minnesota*, 186 U. S., 257.
Puget Sound Traction Co. v. *Reynolds*, 244 U. S., 574.

Plaintiff has made no objection to carrying a much larger proportion of its traffic upon a two cent transfer basis, where the transfer passengers come from the Third Avenue System to which plaintiff belongs. This fixes the fair value of the service rendered. It does not become more valuable because a passenger transfers from Lexington Avenue instead of Third. The transfer Order to which plaintiff objects merely prevents this discrimination. The Record shows that in the "non-transfer" period considered by the Master, the two cent transfer passengers, who must have came from the Third Avenue Line, were about 5,700,000 in number, being about 40% of the total (R., p. 100).

What plaintiff really sought to do by this suit, and has accomplished by the injunction, has been not to protect itself from loss through compliance with the transfer order, but to divert traffic from the lines of the New York Railways System to the lines of the Third Avenue System. It has been willing to lose, as it has in fact lost, by the discontinuance of the transfers, if only the Third Avenue System might gain, as it has. This is shown by Exhibits CU, CV and CW, (Rec., pp. 410-412), from which it appears that since the discontinuance of transfers the Third

Avenue Line has had an uninterrupted series of increases in passenger revenue, while the Lexington and Second Avenue Lines, each only one block distant, show numerous decreases.

It is not within the proper functions of a Federal Court thus to assist one system in its competition with another.

Plaintiff has contended and the District Court appears to have been convinced (R., p. 118), that a resumption of transfers would cause overcrowding of cars and congestion of traffic, but these purely service questions are not within the purview of federal jurisdiction. The Federal Courts may be invoked to protect public utility corporations from confiscation, but the burden has not yet been cast upon them to protect the public from crowding. No additional car mileage operation has been ordered by the Commission, and there is no basis in the evidence for any inference that it would be furnished by the plaintiff without an order by the Commission.

The question of fact presented to the Court below was simply this:

> Would the expense of a resumption of the required transfers so far exceed the revenue therefrom as to be confiscatory?

The undisputed statistics of actual operation demonstrate that it would not.

Plaintiff's extraordinary Exhibit BP (R., p. 357, fol. 576), attempting to set forth the estimated results of a resumption of transfers, was purely conjectural and was properly given no weight by the Master or the District Court.

In short, plaintiff failed to prove its case, and the evidence as a whole shows that the improvement in plaintiff's financial condition since the injunction has been due to other causes, and not to the abolition of the required transfers.

POINT III.

The cost-per-passenger theory applied upon the disposition of the motion for preliminary injunction and by the District Court on final hearing is erroneous.

The plaintiff has contended, and the Statutory Court on the motion for preliminary injunction held in effect, that the cost of carrying each transfer passenger was to be determined by dividing the total expenses of operation (including interest on borrowed money) by the total number of all passengers carried, and that if the cost per passenger, as so determined, exceeded the amount received from each transfer passenger, the rate was confiscatory (R., pp. 68, 69). The District Court, on final hearing, followed this rule, apparently with some reluctance (R., p. 119).

This theory is wholly unsound and erroneous. It is deemed appropriate to present this question with some elaboration, since there appears to be no decision of this Court squarely on the point and it is one which Public Service Commissions are continually called upon to consider.

Transfer traffic upon street railroads is of a peculiar nature. Transfers increase the number of passengers by attracting persons who would otherwise prefer to walk a few blocks rather than pay two fares. This is an obvious

and necessary inference and it is confirmed by experience, both in general and as shown by this Record. When Judge Lacombe directed the discontinuance of voluntary transfers by the Receiver of the Third Avenue and Metropolitan Systems in 1908, the result was a loss of about 15,000,000 pay passengers and a decrease of $813,205 passenger revenue (R., pp. 379, 381). Some of these transfers were restored by the order involved in this suit. After they were again cut off by the preliminary injunction, the same Judge, as Special Master herein, found that plaintiff had lost about 2,000,000 passengers and $46,000 passenger revenue (R., pp. 95-96).

If the added traffic is so great as to require additional cars, it may create an added expense; but unless the traffic does increase to this extent, the transfers create a new source of revenue, with practically no added expense. There will be no appreciable increase in expense unless the added traffic requires more cars; and the amount of increase may be fairly measured by the added expense of operating the additional cars and the increased car mileage, if any. The evidence in this case shows that while there was a loss in passenger revenue (R., pp. 408-409), there was practically no reduction in the number of cars or car miles operated (R., p. 144).

The loss in passenger revenue would have been shown as substantially greater, if the comparison had not been made with a pre-injunction period which included the months of February and March, 1920, when the revenues were cut down by the great snow storm which began on February 4, 1920, and seriously affected traffic conditions for several weeks thereafter (R., pp. 240-244).

If more money is made with transfers than without them, their requirement cannot infringe any right of the Company. If they bring in enough additional revenue to meet such additional cost as there may be and leave something over to be applied to fixed charges, they are beneficial to the Company (See R., p. 382).

This would be true even if the total revenue from the regular five cent fares were insufficient to give a reasonable return on the fair value of the property. If capital has been unfortunately invested, courts are as powerless as business men to make it remunerative. There is here an investment in fixed capital which cannot be withdrawn without loss; fixed charges accumulate and must be met; the Company provides a service, not a commodity which can be withheld for higher prices; and its profits must come from its patronage, which should be stimulated rather than discouraged. Courts may enjoin a lower rate but cannot compel persons to ride at a higher one; and it is good business policy for a carrier to take such additional revenue as it can get, rather than to wait in vain for patronage which will not come at higher rates.

The comparison with a commodity is interesting and enlightening. An illustrative case will make this clear. If it costs a Gas Company $1,000 to manufacture and distribute 100,000 cubic feet of gas, and it is allowed to charge only eighty cents per 100 cubic feet, it suffers a loss of $200 on each 100,000 cubic feet manufactured and sold, and the more it manufactures and sells the more it loses. On the other hand, a street railroad must maintain a certain scale of service under its franchise. If it costs such a railroad $2,500 per day to operate a given

scale of service, and it carries 50,000 passengers at five cents each, it neither gains nor loses. If, in addition to the 50,000 passengers at five cents each, it carries 5,000 more at two cents each, without increasing its scale of service, its cost of operation is not increased and it makes $100. To argue from the average cost of carrying a certain number of passengers, resulting in an ascertained loss, that to carry a larger number would result in a proportionately greater loss, is a *reductio ad absurdum*. The reverse is true; the more passengers a railroad carries upon a given scale of service the more it makes or the less it loses.

The Court below also erred in including interest on indebtedness as a part of operating expenses for the purpose of computing the cost of carrying passengers. Interest paid on indebtedness is not a part of operating expenses, but is *pro tanto* a return on capital (see *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585, 592). Invested capital takes the form both of stock and of bonds or other evidences of indebtedness. When a company properly pays out of current income interest upon its bonds, this shows that it is earning and paying some return on some of the money invested in the enterprise.

It appears from the opinion of Judge Knox that he felt himself bound to adopt the theory enunciated by the Statutory Court, and to regard it as the "law of the case," and it seems not unlikely that without it he might have reached a different conclusion.

Whatever deference he may have felt impelled to show to the opinion of the three learned Judges who composed the Statutory Court, it certainly was not binding upon him as an adjudi-

cation in the cause. All that it actually determined was that upon the *ex parte* affidavits submitted on the motion for preliminary injunction, the Court thought it proper to enjoin the enforcement of the transfer order until all the facts could be brought out on the trial and determined. Upon one most important point it was demonstrated by the evidence and found by the Master that the Statutory Court was mistaken. That Court found that the "deficits produced by plaintiff's carriage of a *majority* of all passengers for two cents a piece amount to or result in confiscation" (R., p. 69). The Master and the Trial Court both found that the transfer order complained of affected only 12½% of the total number of passengers (R., pp. 102, 119). This removes the very foundation from the decision on the motion for injunction. A rate might be confiscatory if required in the case of a majority of all the passengers carried by a street railroad and yet amply compensatory if compulsorily applied only to a small proportion of additional passengers attracted by the reduced rate and carried with no corresponding increase in operating expenses.

Even if the decision on the motion for injunction had been actually the "law of the case," this Court has pointed out that "that phrase expresses only the practice of Courts generally to refuse to re-open what has been decided, not a limit to their power."

See

King v. *West Virginia*, 216 U. S. 92, 100.
Remington v. *Central Pacific R. R. Co.*, 198 U. S. 95, 99, 100.
Messenger v. *Anderson*, 225 U. S. 436, 444.

In any event, the whole case is now before this Court for plenary review and it is hoped that this Court will lay down, as the correct rule for the guidance of Public Service Commissions, that a service requirement is not confiscatory unless it imposes an additional expense unreasonably in excess of the additional revenue which it produces, and then only if the total business fails to yield an adequate return on the fair value of the property used and useful in the public service.

POINT IV.

The rate making process was not completed and plaintiff had not exhausted its legal remedies in the State Tribunals.

In May, 1920, the Receiver of the New York Railways Company made his application to the Commission, asking that these 59th Street transfers be abolished (R., p. 393). After a hearing on this application had been ordered (R., p. 401), the plaintiff injected itself into the proceeding, doubtless in order to guard against the possibility of having the transfers to the Third Avenue System lines abolished with the rest (R., p. 351), thus showing that that System desired to retain the transfers, which plaintiff, as a part of it, alleged to be confiscatory when exchanged with lines of the New York Railways System.

In July, 1920, one year after the Commission had permitted the Receiver of the New York Railways to charge two cents for other transfers (R., p. 399), it made an order increasing the joint rate with the 59th Street line from five to seven cents (R., p. 49). This determination was

probably made principally to avoid discrimination between these joint rate transfers and the other transfers for which the Receiver was collecting two cents.

Plaintiff, a mere intervenor in that proceeding, was the first to ask for a rehearing, which it did on July 23, 1920 (R., p. 402). The Commission took no immediate action on this application, but waited for the Receiver to act. Later, on August 28, 1920, the Receiver made a similar application (R., p. 403) and on August 31, 1920, the Commission granted it and suspended the increase pending the determination of the rehearing (R., p. 405).

The taking of testimony on the rehearing was concluded on November 10, 1920 (R., p. 138). Section 22 of the Public Service Commissions Law, which authorizes and regulates rehearings, provides in part:

> "§22. REHEARING BEFORE COMMISSION. After an order has been made by a commission any corporation or person interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such a rehearing if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted, the same shall be determined by the commission within thirty days after the same shall be finally submitted."

On November 29, 1920, the attorneys for the Receiver wrote to the Commission, suggesting numerous corrections in the minutes of the rehearing (R., p. 426). Counsel to the Commission replied on December 7, 1920 (R., p. 428); and the attorneys for the Receiver wrote again on December 16, 1920 (R., p. 429), the very day

on which the plaintiff filed its Bill of Complaint, in which it was alleged that the Commission had neglected and refused to determine the rehearing although requested by the plaintiff to do so (R., pp. 10, 11). It should be noted that plaintiff introduced no evidence before the Master that it had requested the Commission to determine the rehearing or that the Commission had refused to do so.

Plaintiff wholly failed to prove the facts necessary to support its contention that the Commission ought to have determined the rehearing by December 10th, 1920. The determination is required to be made within thirty days, not from the time the taking of testimony is concluded, but from the time when the rehearing is "finally submitted," and it had not been finally submitted when plaintiff brought suit on December 16th. Until the questions raised by the Receiver as to the accuracy of the Stenographer's Minutes had been disposed of, the case could not be regarded as finally submitted, inasmuch as neither the petitioners nor the Commission could know what the evidence was on which the determination should be made.

The Stenographer's Minutes of the rehearing show the entry, on November 10, 1920, that the Commissioner said "The case is closed" (R., p. 138). This does not signify that there was at that time a final submission of the case within the meaning of §22 of the Public Service Commissions Law. In an equity suit tried before the Court or a Referee the case would be described as "closed" when both parties had rested and the testimony was concluded. If thereafter either

party should wish to introduce further evidence, he would move to "reopen the case." But the case would not be deemed "finally submitted" until all the briefs and requests to find were filed.

The practice is a familiar one in New York. Section 470 of the Civil Practice Act (formerly §1019 of the Code of Civil Procedure) provides that either party may terminate a reference, if the Referee fails to render a decision "within sixty days from the time when the cause or matter is finally submitted to him." It has been frequently held under this section that the sixty day period does not begin to run from the closing of the testimony, but from the final submission of all briefs and other papers.

See

Matter of Robinson, 53 Misc. (N. Y.) 171, 183.

Burritt v. *Burritt,* 53 Misc. (N. Y.) 26.

In like manner, the closing of a public hearing before a Public Service Commission is not equivalent to final submission unless it is expressly so stated on the record. Further time may be allowed, either by formal direction or informal acquiescence, for the correction of errors in the Record, the authentication and submission of Exhibits, the preparation and submission of briefs and other purposes. In the matter under consideration certain important corrections of the Stenographer's Minutes were proposed, not by the Commission, but by one of the parties (see Exhibits DD, DE, DF, R., pp. 426-429). These corrections were never completed and hence the case was never finally submitted.

The statutory provision for a decision in thirty days after final submission upon a re-hearing is directory and not jurisdictional.

See

Mt. Konocti Light & P. Co. v. *Thelen*, 150 Pac. 359; P. U. R., 1915 E. 291, 293.

A few days delay is neither a refusal nor a failure to decide, in law or in fact. Ordinary good faith called for at least a request for a decision by the Commission before a resort to the Federal Courts. Instead there was an ingenious manipulation of procedure by one party, resulting in a short delay in final submission, while the other party (this appellee) prepared its Bill and moving papers and invoked the federal jurisdiction.

Moreover, the two cent share of the joint rate, allocated to this plaintiff and now objected to by it as inadequate, was never fixed by the Commission; it was agreed upon by the interested parties (R., p. 306). Manifestly the Third Avenue System had a potent and probably controlling voice in the agreement. It may well be that if the plaintiff had insisted on a larger share and had applied to the Commission for relief a different apportionment would have been made. The average length of ride is not necessarily controlling. Street car fares in New York City are not determined by the length of the ride. In the apportionment of a joint rate between an up-and down-town line and a cross-town line there are other elements to be considered. Owing to the configuration of Manhattan Island, it is highly probable that a larger proportion of cross-town

traffic is made up of passengers who use the cross-town line as merely one link in a longer journey than is the case with up-and down-town traffic. If the transfer traffic is thus a more important part of the whole business of the cross-town line, that line may have good grounds to ask for a larger proportion of the joint rate than the up-and down-town line, even if the latter gives to the transfer passenger a longer average haul. A short cross-town line has many more points of intersection with other lines in proportion to its length than a long up-and down-town line.

It has been very recently held by this Court that mileage haul is not the only factor in the division of transit rates. See *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 284 and cases cited.

It is significant that the Receiver of the New York Railways, although one of the moving parties in the application to the Commission for an increased joint rate and in the subsequent application for a rehearing, never joined in this suit or otherwise sought to enjoin the enforcement of the transfer order, except by appearing as *amicus curiae* on the motion for preliminary injunction.

It thus appears that the legislative process for the fixing of the *two cent* rate formerly received by plaintiff has not only not been concluded, but has not even been initiated. The two cent rate was voluntarily accepted by the plaintiff and it should not be heard to complain of it, at least until it has applied to the Commission for a larger share. Plaintiff's resort to the Federal Court was therefore premature as well as unfounded.

POINT V.

The plaintiff's own conduct in the matter has been such as to disentitle it to equitable relief

The constitutional question of alleged confiscation is the only basis for Federal jurisdiction in this case. But even where the allegations of confiscation are such as to confer jurisdiction the general rules of equitable jurisprudence apply to equitable remedies. A plaintiff seeking equitable relief in the Federal Court, as in any other Court of Equity, must show that his own conduct has been equitable and that his position is fair. This the plaintiff does not do. The reverse is the case. By the Order of July 9th, 1920, the Commission awarded a liberal increase in the joint rate, which the statistics of subsequent operations show would have been not only compensatory but profitable. Plaintiff rejected this and strenuously objected to any joint rate at all. Then without waiting a reasonable time for a decision on the rehearing or even asking for a decision, it took advantage of a very brief delay caused by its co-applicant's maneuvers and came into the Federal Court on an allegation of the Commission's refusal to act.

At no time has plaintiff sought relief by applying to the Commission for a re-apportionment of the joint rate. It has stood upon the proposition that any joint rate is confiscatory.

It has not objected to continuing operations under the required joint rate in the exchange of transfers with the Third Avenue System. It appears from the statistics in evidence (R., pp. 410-412) that this has resulted in diverting to

the Third Avenue Line a substantial part of the traffic which formerly went to the other up-and down-town lines with which transfers were then exchanged. A resort to the Federal jurisdiction upon allegations of confiscation, for the purpose, not of any direct improvement in plaintiff's financial condition, but of discriminating against lines with which plaintiff is not connected and favoring the system to which plaintiff belongs, is a perversion of the purpose for which the Federal Courts were established. This alone demonstrates the complete lack of equity in plaintiff's case. Plaintiff did not seek to protect its own interests as a separate Corporation, but acted as a stalking horse for the Third Avenue System.

It carries without objection 40% of its passengers upon Third Avenue transfers for two cents each, but objects to being required to carry 12½% of them on other transfers. The Federal Courts should not be called upon to assist it in thus straining at the gnat while swallowing the camel.

POINT VI.

The plaintiff voluntarily assumed the obligation to carry transfer passengers pursuant to the order of October 29th, 1912, for two cents each, and having been incorporated and acquired its properties subsequent and subject to such order, it is not entitled to complain of it as an infringement of any constitutional right.

This question was presented by the motion to dismiss the Bill which was denied by Judge Hough, who at the same time overruled the Second Separate Defense, setting up this point, as insufficient in law (R., p. 78). It therefore did not come before the Master (R., p. 87) or before the Court on final hearing, but it is properly before this Court on appeal from the final decree.

The transfer order was made on October 29, 1912, against the Central Park, North and East River Railroad Company (R., pp. 15-26), which formally accepted the order (R., p. 391, fol. 613) before its property was sold under foreclosure (R., p. 265, fol. 460). The purchaser subsequently, on December 24, 1912, organized the plaintiff pursuant to the provisions of Section 9 of the Stock Corporation Law (R., pp. 286-288), and later conveyed the property to it (R., p. 279). It will be observed that the Statutory Court fell into error on this point, and described the plaintiff as having been incorporated in 1911 (R., p. 67), which would have been prior to the transfer order.

Section 9 (now §96) of the Stock Corporation Law (N. Y. Consolidated Laws, Chapter 69) provided:

> "§9. *Reorganization upon sale of corporate property and franchises.*—When the

property and franchises of any domestic stock corporation shall be sold by virtue of a mortgage or deed of trust, duly executed by it, or pursuant to the judgment or decree of a court of competent jurisdiction, or by virtue of any execution issued thereon, and the purchaser, his assignee or grantee shall have acquired title to the same in the manner prescribed by law, he may associate with him any number of persons, not less than the number required by law for an incorporation for similar purposes, at least two-thirds of whom shall be citizens of the United States and one shall be a resident of this state, and they may become a corporation and take and possess the property and franchises thus sold, and which were at the time of the sale possessed by the corporation whose property shall have been so sold, upon making and acknowledging and filing in the offices where certificates of incorporation are required by law to be filed, a certificate * * * [then follow provisions as to contents of certificate] * * *

Such corporation shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receiver, and *shall be subject to all the provisions, duties and liabilities imposed by law on that corporation.* [In its present form, the last clause reads: "all the duties imposed by law on that corporation."]

By the terms of the statute under which it was incorporated, plaintiff was thus made "subject to all the provisions, duties and liabilities imposed by law" on its predecessor, the Central Park, North and East River Railroad Company.

By coming into existence and acquiring its properties subject to the conditions laid down in the statute, plaintiff voluntarily submitted to and accepted the transfer order; it was not imposed upon it *in invitum*. As the transfer order was in force when plaintiff took its charter, there was no violation of the Fourteenth Amendment. Plaintiff's constitutional rights cannot have been infringed by a lawful exercise of governmental power which antedated its existence.

It is to be noted that there is no suggestion that the *statute* under which the transfer order was made in any way violates the Constitution.

The question of the effect of the incorporation of a Company after the passage of a statute which affects its operations has been squarely decided by this Court.

> See *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79.

The Railway Company there concerned was incorporated after the passage of a Massachusetts Law requiring the transportation of public school pupils at half fare. The Company contended that the statute was unconstitutional in that it denied to the Company the equal protection of the laws and deprived it of its property without just compensation and without due process of law. The Railway Company offered to prove that the actual cost of transportation of each passenger was considerably greater than half the regular fare. This offer of proof was rejected and it was held by the State Court that the statute was not repugnant to the Fourteenth Amendment. This was affirmed by this Court upon the ground

that "the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter." The Court considered that the effect was the same as if the statute complained of had been written into the charter itself, so that the acceptance of the charter was in effect an acceptance of the statute.

The learned Circuit Judge who denied the motion to dismiss distinguished this case on the ground that a general statute was a very different thing from a regulatory order of a Commission (R., p. 76, fol. 119). This distinction is unsound.

The proceedings of a Public Service Commission are legislative in character (*Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226 and other cases cited, *supra*, p. 19). Regulatory orders are made in exercise of a delegated legislative power and require the same obedience as statutes. This order was made pursuant to the Public Service Commissions Law, Section 49, subdivision 3. The duty to comply with it was expressly imposed by another provision of the statute (Public Service Commissions Law, Section 56, subdivision 1):

> "Section 56. FORFEITURE; PENALTIES. 1. Every common carrier, railroad corporation and street railroad corporation and all officers, and agents of any common carrier, railroad corporation or street railroad corporation shall obey, observe and comply with every order made by the commission, under authority of this chapter so long as the same shall be and remain in force." • • •

A regulatory order made under the authority of the statute thus has the force and effect of a

statute and is equivalent thereto. Section 56 requires the corporation to obey the orders which it has authorized the Commission to adopt, thus imposing a duty as directly as the Massachusetts legislature did.

The decisions in the state courts, on which the learned Circuit Judge relied as an alternative support (R., p. 76), are not authority for the proposition that plaintiff has the same right to complain as its predecessor would have had. *Minor* v. *Erie R. R. Co.*, 171 N. Y. 566, held that a reorganized corporation, incorporated after the Mileage Book Act was passed, was subject to the provisions of it although the act had been declared unconstitutional as to its predecessor.

The learned Circuit Judge apparently based his opinion upon a remark made *arguendo* in the course of the opinion in the *Minor* case and upon an amendment to the statute which followed that decision. At that time, the statute provided that the new corporation should be "subject to all the provisions, duties and liabilities imposed by law on such *corporations.*" This, said Chief Judge Parker (page 572), indicated a purpose to subject the new corporation to all the general provisions of law governing railroad corporations; had the statute read "on such *corporation*" the new corporation would not have been subject to the Mileage Book Act, for that had been held unconstitutional as applying to corporations in existence at the time of its passage. In 1904, subsequent to this decision, the statute was amended by changing "such corporations" to "that corporation" (Laws of New York, 1904, Chapter 706).

It is clear that thereafter a new corporation would not be subject to all provisions governing railroad corporations but only to those governing the predecessor corporation; but it is just as clear that the new corporation would be subject to all the provisions of law governing its predecessor. Now, the transfer order did apply to and govern its predecessor. The Circuit Judge said that the presumption was that it was a perfectly proper order (R., p. 76). The presumption is strengthened by the fact that the predecessor corporation accepted it (R., p. 391) and that plaintiff obeyed it without question for nearly eight years. It follows that, as the transfer order was a proper one imposed by law on "*that* corporation," *i. e.*, the predecessor, the plaintiff became subject to it according to the express language of the statute.

The case of *People ex rel. Third Avenue Ry. Co.* v. *Public Service Commission*, 203 N. Y. 299, also cited by the Circuit Judge, does not affect in any way the questions here presented. It did not involve the particular provision of the statute mentioned above. The question in that case was not whether the new corporation was subject to any of the duties and liabilities imposed upon the old, but whether certain sections of the Stock Corporation Law were repealed by the provisions of the Public Service Commissions Law. The Court held that both were effective.

The *Interstate Railway* case, *supra*, disposes of the contention that unconstitutionality of the original order may be predicated upon "changed conditions" (R., p. 120). If that contention could have been successfully urged as a ground for invalidating the Massachusetts half-fare

statute the evidence offered, and held to have been properly rejected, would clearly have been competent and admissible.

It appears from the Record and Briefs in that case that the statute in question was passed in 1900; that the railroad company was incorporated in 1901, and took over the property of a former corporation; that the proceedings were begun in 1903 and the trial held in 1904; and that the offer of proof related to the fiscal year ending Sept. 30, 1903, some three years after the passage of the statute.

This point is urged upon this Court independently of appellant's other arguments. If it be sustained, the others need not be considered.

POINT VII.

The valuation placed upon plaintiff's property by the Court below was erroneous in law and fact and unsupported by competent evidence.

If this Court shall decide to grant a reversal on Points IV, V, or VI, *supra,* or shall hold that the proper test to apply is that set forth under Point II, namely, whether the additional expense of the transfer traffic substantially exceeds the additional revenue, the question of valuation will not necessarily arise. In fact, valuation is a major issue only in cases involving the whole rate structure and the entire net revenue of a public utility. Where the rate attacked is that fixed for a specific and incidental service, it is not necessarily material what rate of return the public utility earns upon its entire operations.

If the general rate is less than compensatory it may well be due to wholly different causes, unrelated to the special rate attacked. On the other hand, an amply compensatory average rate on its business as a whole is additional justification for reasonable service requirements, even if, by themselves, they involve some slight loss.

If this Court shall reach the conclusion that the required transfer traffic would be substantially self supporting it need not consider the question of valuation at all.

The question of valuation having been raised in and passed upon by the Court below, it is necessary to deal with it upon this appeal. This will be done in detail by the New York Corporation Counsel, representing the District Attorney, in whose admirable brief on this subject the Commission joins. To avoid burdening the Court with unprofitable repetition, the position of the Commission on this point will merely be briefly stated as follows:

The valuation of $2,600,000 fixed by the Court below is erroneous because:

(a) It is based upon an inventory which includes property not shown to belong to plaintiff.

(b) It is not supported by competent evidence of value as to the property included.

(c) It is based upon an erroneous theory, namely, present cost to reproduce, less expense of putting into good operating condition (erroneously styled depreciation) and does not even purport to represent "present fair value" as defined by the decisions of this Court.

SUMMARY.

1. The true test to be applied in this case is whether the additional expense of the transfer traffic so far exceeds the additional revenue derived therefrom as to be confiscatory. The uncontradicted evidence shows conclusively that it does not.

2. The rate-making process was not complete; the plaintiff had not exhausted its legal remedies; and its own conduct disentitles it to equitable relief.

3. The plaintiff's incorporation subsequent to the order complained of bars it from questioning the constitutionality of such order.

4. The valuation made by the Court below is erroneous and unsupported by competent evidence.

CONCLUSION.

The decree appealed from should be reversed, the injunction vacated, and the cause remanded with instructions to dismiss plaintiff's bill on the merits with costs in both Courts.

Respectfully submitted this 9th day of February, 1925.

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